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Appellee's Brief 1975-SC-1069

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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 75-1069

WILBERT H. RILEY and
PAUL DEMPSEY, ET AL. - - - Appellants

versus

JUDGE JAMES C. THOMPSON, as a member
of the Lyon County Fiscal Court and indi-
vidually, et al.; and
THE LYON COUNTY FISCAL COURT - Appellees

versus

HERSCHEL O. YOUNG, Individually and as
Trustee,
CLAUDE A. PRICE and
DOUGLAS E. OATES - - - Appellees and
(Third Party Defendants)

APPEAL FROM LYON CIRCUIT COURT
HONORABLE STEPHEN P. WHITE, JR., CIRCUIT JUDGE

BRIEF FOR APPELLEES, JUDGE JAMES C. THOMP-
SON, ET AL., AND THE LYON
COUNTY FISCAL COURT

FILED

FEB 6 1976

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This is to certify that copies of the within Brief have been served
on the Hon. Bill Cunningham, Eddyville, Ky., Hon. James E. Story, Ed-
dyville, Ky., and the Honorable Stephen P. White, Jr., the trial judge,
pursuant to RCA 1.250, this February 5th, 1976.

William R. Young
WILLIAM R. YOUNG
Attorney for Appellees

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STATEMENT OF QUESTION PRESENTED

The question presented upon this appeal is:

Should the Lyon County Fiscal Court be forced, by mandatory injunction, to accept privately developed subdivision roads and streets into its system of county maintained roads when the developers have failed to construct said roads and streets according to minimum standards established and required by the Court?

SUPREME COURT OF KENTUCKY

File No. 75-1069

WILBERT H. RILEY and
PAUL DEMPSEY, ET AL. - - - *Appellants*

v.

JUDGE JAMES C. THOMPSON, as a Member of
the Lyon County Fiscal Court and In-
dividually, et al.; and
THE LYON COUNTY FISCAL COURT - *Appellees*

v.

HERSCHEL O. YOUNG, Individually and as
Trustee
CLAUDE A. PRICE and
DOUGLAS E. OATES - - - - *Appellees and*
(Third Party Defendants)

APPEAL FROM LYON CIRCUIT COURT
HONORABLE STEPHEN P. WHITE, JR., CIRCUIT JUDGE

**BRIEF FOR APPELLEES, JUDGE JAMES C. THOMP-
SON, ET AL., AND THE LYON
COUNTY FISCAL COURT**

May it please the Court:

STATEMENT OF THE CASE

This is an appeal from a Trial Order and Judgment in the Lyon Circuit Court which dismissed Appellants' (Plaintiffs') Complaint to compel, by mandatory injunction, the Lyon Fiscal Court to accept two pri-

vately developed subdivision roads into its system of county maintained roads.

Palisades Subdivision is a private development having been acquired in 1963 by Herschel O. Young, Claude A. Price and Douglas E. Oates in two separate tracts with Herschel O. Young being designated trustee for convenience in selling lots. Two plats of Palisades Subdivision have been filed; one on October 13, 1965 and recorded in Plat Book 2, page 9, Lyon County Court Clerk's Office and the other on February 3, 1966 and recorded in Plat Book 2, page 50, Lyon County Court Clerk's Office. The latter plat shows additions to the subdivision not shown on the earlier plat and both plats show the roads which are the subject of this litigation.

For several years after the initial development of Palisades Subdivision, Herschel O. Young maintained a real estate office in Eddyville and provided maintenance for the subdivision roads in question. Recently, however, the real estate office has left Lyon County and with it the maintenance of the roads. No longer being provided maintenance by the owners of the subdivision, the residents turned to the county but were informed that in accordance with long established policy the county would not take over the maintenance of the roads until they were brought up to minimum acceptable standards.

It should be pointed out that the portion of Palisades Drive from point A to point B on Exhibit I is the same as an old existing county road that the same has not been discontinued according to law. Pursuant

to KRS 178.020 it is still a county road and the parties have so stipulated. The portion of the old county road from point B down to the shores of Lake Barkley was legally closed at the request of the developers, thus providing them with additional lakefront lots. The remaining portion of the old county road is now under the waters of Lake Barkley. The old county road, most of which was inundated by Lake Barkley, was replaced by Kentucky Highway 93 which extends from Eddyville to Lamasco and crosses over the waters of Eddy Bay. The remaining portions of Palisades Drive and all of Marina Drive, which are the subjects of this litigation, were designed and constructed solely by the developers as part of the subdivision.

ARGUMENT

Should the Lyon County Fiscal Court be Forced, by Mandatory Injunction, to Accept Privately Developed Subdivision Roads and Streets Into Its System of County Maintained Roads When the Developers Have Failed to Construct Said Roads and Streets According to Minimum Standards Established and Required by the Court?

Although there are many facets to the argument which will be discussed, the main issue in this litigation is whether the Lyon Fiscal Court should be forced, by mandatory injunction, to accept privately developed roads and streets into its system of county maintained roads when the developers have failed to construct said roads and streets according to minimum standards established and required by the Court.

Appellants and Third Party Appellees devote a large portion of their arguments to the discussion of public roads. Actually, their arguments present nothing more than a good discussion of the reasons the developers would be estopped from closing the roads which they have dedicated. Neither argument cites cases or statutes which impose a duty on a governmental agency, such as the Lyon Fiscal Court, to accept and maintain the roads which have been dedicated. KRS 178.025(1) is cited and states:

“Any road, street, highway or parcel of ground dedicated and laid off as a public way and used without restrictions by the general public for five (5) consecutive years, shall conclusively be presumed to be a public road.”

That KRS 178.025(1) is a shield for the protection of contiguous property owners from encroachment by others upon the dedicated land and not a sword to impose a duty or liability on governmental authorities is clearly pointed out in Kentucky decisions. The cases of *W. T. Congleton & Company v. Roberts, et al.*, 221 Ky. 712, 299 S. W. 579 (1927) and *Lemon v. Edwards*, Ky., 344 S. W. 2d 822 (1961), cited in opposing briefs, discuss the sufficiency of dedication and not the question at hand. The distinction is clearly pointed out in *Salyers v. Tackett*, Ky., 322 S. W. 2d 707 (1958). The Court, page 709, stated:

“A way dedicated in the manner in which the so-called street to which this case relates was dedicated to public use cannot be regarded as a ‘public road’ in the sense that it became part of the coun-

ty's system of roads which must be maintained within the meaning of the statute, for the way was never legally accepted or established as such."

After appropriate citations, including KRS 178.020 and 178.080, the Court continued:

"But it was and is a public road in the sense that the dedication inured to the benefit of the public, and the public, particularly contiguous property owners, had a right to use it."

Again the Court gave appropriate citations including the *W. T. Congleton & Co.* case, *supra*.

County roads are public roads which have been accepted by the fiscal court as a part of the county road system (KRS 178.010). At best, Palisades Drive and Marina Drive are public only in the sense that the owners have dedicated them and cannot encroach upon them. They have not been accepted by the fiscal court. Furthermore, the Attorney General has ruled that the fiscal court may exercise its discretion in deciding on which roads to accept into the county road system:

"... Under the statute the establishing of a county road is left to the sound discretion of the fiscal court, and it depends upon whether the fiscal court deems such road to be in the best interest of the county. . . ." (OAG 72-80)

In the same opinion, the Attorney General stated:

"... It is further our opinion that KRS 178.010-(1)(b) envisions a formal acceptance, on the part of the fiscal court by an appropriate order, of a road as a part of the county road system. . . ."

In a separate opinion, the Attorney General stated:

“... A mandamus or injunction suit against public officers is the appropriate remedy where the officers are required to perform a duty imposed by law . . . Here the fiscal court under KRS 178.115 is not obligated to take any particular road into the county road system. It has a discretion in such matters. It is not a ministerial function. . . .”
(OAG 72-81)

It is alleged that there were no legally adopted or printed specifications and consequently it was impossible for the developers to know of and comply with “phantom” standards. However, the evidence does not support this position. Herschel O. Young, on cross-examination by County Attorney, Bill Young, about a meeting several years ago with Magistrate Dow Oliver stated (T.R. pp. 194-195):

Q. I am asking the questions, Mr. Young, and you do your best to answer them. What again did Mr. Dow Oliver tell you would be required before the County could take over the roads?

A. The best I can remember was he discussed the having of a crown on the road, widening the road at certain points, and some drainage problems.

Q. And he said that if these were done, then the County would take the roads over?

A. Not definitely.

Q. Did he indicate—

A. No, I could have done that and later on, there would have been something else that would have needed to be done.

Q. I believe that is a supposition of your part, isn't it?

A. Yes, it is.

Q. But, he left you with the impression that these things that he mentioned were a prerequisite to the County taking over the roads, is that correct?

A. Yes, I would say so.

It has always been the policy of the Lyon Fiscal Court to accept the advice of the State Department of Highways (now Bureau of Highways) in determining what standards to require of a road prior to accepting it into the system of county maintained roads. KRS 176.250(1) states that the Department shall recommend rules and regulations determining the method of constructing roads and instruct and advise with the county as to the establishment of grades and suitable systems of drainage and as to the construction, improvement and maintenance of public roads. These recommendations are the standards used by the Court in determining which roads are acceptable and which are not. When questioned on cross-examination by Hon. James E. Story, former Lyon County attorney and now attorney for the developers, magistrate Dow Oliver stated (T.R. p. 199):

A. We went by the State specifications—that's what we went by. That's what you told me when you were County attorney. That's what they told us.

Q. What are the County specifications?

A. We are just taking whatever the State give us for specifications. That's all we could do. That's the only way you can do it.

Reference is made to other testimony by Magistrate Oliver which points out how the initial construction of the roads in Palisades Subdivision did not come up to the standards recommended by the State and used by the fiscal court.

It is alleged that the county maintains other county roads which are inferior to the Palisades roads and the Bill Thompson Road and the Jack Thompson roads are pointed out as examples (T.R. pp. 180-181). As Magistrate Oliver explained (T.R. p. 200) "If they are old, established roads, I have to maintain them—they are County roads." KRS 178.020 states:

"Every county road, bridge and landing, and every city street and alley heretofore lawfully established and opened and not lawfully discontinued or vacated shall continue as such, until properly discontinued."

It is maintained that the county has "accepted" the roads because of the sporadic use of a grader. This is not the case. The county, by occasionally responding to a request for the use of its grader, has not exercised control over the roads and has certainly not accepted the roads into its system of county maintained roads. Even the testimony of one of the appellants indicates that the county has not accepted maintenance of the road (T.R. p. 84):

Q. Has the county done any work at all on any portion of the road other than grading it that you know of? Drainage or anything like this?

A. No, sir.

Q. Around your house?

A. No.

The Kentucky legislature considered the problem of maintenance of subdivision roads as recently as 1972 when it added two paragraphs to KRS 179.470. Obviously, the legislature recognized the financial impossibility of a small rural county maintaining subdivision roads when it only imposed a duty on the fiscal courts of counties containing a city of the third class. Even then, certain requirements must be met. It should be noted that the only two incorporated cities in Lyon County, Eddyville and Kuttawa, are fifth class cities (KRS 81.010).

Let us direct our attention to the counterclaim of the developers. They are asserting a claim against the county for \$5258.60, which they allege was expended by them on the portion of Palisades Drive which was and is a county road. To begin with, they have not proven their claim. Secondly they have not taken an appeal from the Trial Order and Judgement dismissing their counterclaim. Thirdly, the very thought that the county would be liable, years later, for something the developers did on their own and for their sole monetary benefit is preposterous. Herschel O. Young testified as follows (T.R. p. 191):

Q. Let's talk about this Counterclaim for awhile, Mr. Young. Did you and the County develop this subdivision as a joint venture?

A. Absolutely not.

Q. It was a privately developed subdivision?

A. Yes, sir, all of them are.

Mr. Young continued (T.R. p. 192):

Q. In other words, this is the only road which you directly caused to be improved?

A. Yes.

Q. Why did you chose to improve this particular County Road?

A. We had property on the road and it was not passable.

Q. Do you feel it was a necessary venture in order to assist you in selling lots for the subdivision?

A. Absolutely.

The county did not request this expenditure by the private developers.

CONCLUSION

Appellants have ignored the distinction of "public roads" in the sense of roads that have been dedicated for public use and "county roads" in the sense of roads which have been accepted by the county as part of its system of county maintained roads. The trial court was correct in dismissing the complaint.

The remedy of appellants, if any, should lie in a direct action against the developers of the subdivision. To hold otherwise would set the dangerous precedent of using limited public funds for the unjust enrichment of subdivision developers who would be encouraged to expend less and less on the initial "development" of their subdivision.

Respectfully submitted,

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James C. Thompson, as a
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